# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 1228

LEONARD SIMMONS FENTRESS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The per curiam affirmance by the court of appeals is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 6, 1969. A petition for rehearing was denied on March 4, 1969. The petition for a writ of certiorari was filed on April 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether there was derivative use by the government of evidence alleged by petitioner to have been illegally seized.

## STATEMENT

After a trial by jury in the United States District Court for the District of Maryland, petitioner was convicted on all counts of a five-count indictment alleging various counterfeiting offenses in violation of 18 U.S.C. 2, 371, and 471-474. He was sentenced to imprisonment for seven years (1 R. 7-16, 5). The court of appeals affirmed per curiam (Pet. App. A).

1. The principal trial evidence against petitioner consisted of testimony by three co-conspirators, McGirr, Riffles, and Gasch. McGirr and Riffles testified that Gasch and another conspirator, Peden, knew someone in the Maryland penitentiary who had negatives from which twenty-dollar Federal Reserve notes could be printed. McGirr, Riffles, Gasch, Peden, and petitioner agreed to obtain these negatives, print counterfeit money and, once petitioner had been repaid the money he advanced to finance the deal, divide the profits (3 R. 28-34, 138-140). Thereafter, the negatives were obtained and delivered to petitioner and McGirr. Petitioner examined them, said they were "good work" and that they should get a press (3 R. 141-142). They bought a press and brought it to Municipal Auto Sales, petitioner's place of business, in a truck petitioner furnished (3 R. 39, 142-143). They then printed about $100,000 in counterfeit bills. Peti-

tioner would be present or stand guard when this was being done. After the bills were printed, they were taken to an apartment shared by petitioner and Riffles, where they were cut, sized, dyed and aged (3 R. 48-50, 148-151).[1] A Baltimore printer who had no part in the conspiracy testified that he had made several trips to Municipal Auto Sales at Riffles' request to get the press in working order. It had been in use and had green ink in the "fountain." He had met with petitioner and others on these visits (3 R. 195-200; 2 R. 40-41).

2. Petitioner's contentions in this Court relate to the seizure under warrant of the printing press. The warrant and seizure were challenged by a motion to suppress before trial. The motion was denied, but the government nonetheless introduced neither the seized items nor testimony relating to the seizures during the trial.

The warrant was obtained during the course of an investigation which began when the Secret Service agents were told by an informant that petitioner and others were engaging in counterfeiting activities (2 R. 51; 3 R. 112). Through their informant, the agents arranged to buy $20,000 in counterfeit currency from McGirr (3 R. 26, 96). At about the same time, the Service canvassed area printing equipment supply houses and learned that McGirr had recently

[1] Gasch, whom the others had eliminated from the scheme after it started (3 R. 146), testified that he met with petitioner and the others and helped procure the negatives (3 R. 209-215). Peden who had died before the trial, had also been eliminated from the scheme (3 R. 141-142).

purchased an A. B. Dick Model 350 offset printing press.

An agent accompanied McGirr from Baltimore to Friendship Airport on June 2, 1966. There McGirr entered the terminal and came out carrying a box found to contain 1,000 counterfeit twenty-dollar Federal Reserve notes. McGirr was arrested upon their return to Baltimore (3 R. 96, 104-105). On his person was petitioner's check for twenty-three dollars payable to him (Deft. Exh. 2) and documents connecting him with both petitioner and Municipal Auto Sales, petitioner's place of business in District Heights, Maryland (2 R. 52-53).

On June 3, 1966, the agent in charge of the investigation asked the sheriff of Prince George's County to help ascertain whether a printing press was on the premises at Municipal Auto Sales. The sheriff radioed two deputies, who met and talked with the agent. The deputies then proceeded to Municipal Auto Sales, where they obtained petitioner's permission to search the premises for a narcotics violator known to petitioner. Their real objective was to see if a printing press was there. Through the open door to a small office marked "General Credit," they saw a machine which they took to be an office duplicator or mimeographing machine. A desk with two telephones, chairs and file cabinets were also in the office, which occupied a small building off petitioner's used car lot (2 R. 27, 61, 67, 70, 74, 78; Govt. Exh. 14). When the deputies reported their observations to the agent, he decided to look for himself. On entering the office and

finding that the machine matched the description of the press purchased by McGirr, he instructed the deputies to watch the premises from across the street, and went to apply for a search warrant, on the basis of the affidavit set out in the petition (Pet. App. C). During his absence, an employee of petitioner invited the deputies into the office to escape the heat. They waited there, again viewing the machine, while the employee was seated at the desk (2 R. 79-80, 86). The search warrant was served and the press seized at about 5:00 p.m. (2 R. 65).

Despite the seizure of the press, petitioner was not named in the indictment originally returned against the other conspirators. On the eve of their trial, however, McGirr and Riffles fell out with petitioner who, they claimed, had defaulted on a promise to pay their attorney fees. They then interposed guilty pleas and gave statements implicating petitioner. The case was continued and a superseding indictment naming petitioner as a defendant was returned (2 R. 8-9; 3 R. 51, 85, 153-156).

At petitioner's trial, the trial court denied his motion to suppress, expressing the opinion that the deputies had a legitimate reason for going on the premises to look for a person whom they wished to apprehend; that to observe that which was clearly to be seen was not a "search"; and that in any event the office was public, as indicated by the sign, "General Credit," outside (2 R. 93-94).

## ARGUMENT

Petitioner concedes (Pet. 7) that no testimony concerning the seizure of the printing press was elicited before the jury at trial and that the identities of McGirr and Riffle were not learned as a result of the seizure. He argues, nevertheless, that had the testimony of McGirr and Riffle been induced by an illegal seizure, it would have been subject to exclusion. He excuses his failure to move for such exclusion at trial on the basis of the trial judge's upholding of the validity of the search.

Even assuming such an argument could now be entertained, the record clearly shows that the testimony of the witnesses was not the "fruit" of the seizure. McGirr and Riffle each testified that his determination to tell the whole story coincided with petitioner's failure to honor a promise to take care of their attorney fees. McGirr had been caught with the goods. Riffle was clearly implicated by the testimony of the printer who repaired the press at his instance. In addition, Gasch, who had been counted out by the other conspirators, testified to petitioner's participation in planning the enterprise. The evidence adduced at trial was thus independent of the seizure. *Wong Sun* v. *United States*, 371 U.S. 471, 488; *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385; *Harried* v. *United States*, 389 F.2d 281 (C.A.D.C); cf. *Smith and Bowden* v. *United States*, 324 F.2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954, rehearing denied, 379 U.S. 873.

While the validity of the search warrant under

which the press was seized is thus not really in issue, petitioner's attack on the affidavit (Pet. 5-6) is without merit. The affidavit alleged the purchase by McGirr of an offset printing press which was described with particularity, the claim by McGirr that he had manufactured twenty-dollar bills, his delivery of such bills to a government agent, the fact that McGirr frequented Municipal Auto Sales, and the fact that affiant had observed, through an open door in the public portion of such premises, an offset printing press of the exact type purchased by McGirr, as well as a can of green printing ink. The fact that the press was of the particular make and model recently purchased by McGirr, who had been arrested with $20,000 in counterfeit currency in his possession, and that it had been observed together with a can of green printing ink in a place with which McGirr was associated, constituted probable cause to believe that the press was involved in the counterfeit operations. The facts detailed in the affidavit were sufficiently specific to meet the test of *Spinelli* v. *United States*, 393 U.S. 410.[2]

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[2] In the court of appeals petitioner argued that the press was improperly seized in that the officers gained entry by fraud and misrepresentation. Aside from any question whether a search may validly be based upon consent gained by giving only one reason for requesting permission when another reason is in fact predominant, the answer to the contention is that the press was in a public place. The public at large, including officers of the law, could properly enter without permission.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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